

FHL

1ST CIRCUIT COURT  
STATE OF HAWAII  
FILED

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N. ANAYA

CLERK

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

JANENE CARACAUS,

Respondent-Appellant,

vs.

WILLIAM D. HOSHIJO, Executive  
Director, on Behalf of the Complaint Filed  
by Del M. Scotto, and the Civil Rights  
Commission, State of Hawai'i,

Appellee,

and

LORETTA RAMOS, Executrix of the  
Estate of Del M. Scotto,

Complainant-Appellant,

vs.

LISA WONG, SARA BANKS, LESLIE  
ALAN UEOKA, and MARK G.  
VALENCIA in their official capacities as  
Commissioner of the HAWAII CIVIL  
RIGHTS COMMISSION, DEPARTMENT  
OF LABOR AND INDUSTRIAL  
RELATIONS, STATE OF HAWAII;  
WILLIAM D. HOSHIJO, in his official  
capacity as Executive Director of the  
HAWAII CIVIL RIGHTS COMMISSION,  
DEPARTMENT OF LABOR AND  
INDUSTRIAL RELATIONS; STATE OF  
HAWAII; and JANENE CARACAUS,

Appellees.

CIVIL NO. 07-1-1325

(Agency Appeal)

(Consolidated with Third Circuit Court

Case No. 07-1-0230 (Agency Appeal))

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW;  
CERTIFICATE OF SERVICE

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STATE OF HAWAII  
ATTORNEY GENERAL  
LABOR DIVISION

Oral Argument

Date: Tuesday, May 13, 2008

Time: 3:00 p.m.

Judge: Hon. Eden Elizabeth Hifo

I do hereby certify that this is a full, true, and  
correct copy of the original on file in this office.

*N. Anaya*

Clerk, Circuit Court, First Circuit

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

In these consolidated agency appeals, Respondent-Appellant Janene Caracaus filed her appeal in the First Circuit, Civil No. 07-1-1325, on July 18, 2007, and Complainant-Appellant Loretta Ramos, Executrix of the Estate of Del M. Scotto, filed her appeal in the Third Circuit, Case No. 07-1-0230, five days later on July 23, 2007. Several issues are raised in connection with the Hawaii Civil Rights Commission (HCRC) decision appealed from, which determined Ms. Caracaus as landlord had unlawfully discriminated against her tenant, decedent Scotto, on the basis of his disability resulting from prostate cancer by terminating his tenancy. The HCRC concluded the landlord acted with mixed motives (one being lawful) and thus declined to award monetary damages, but the HCRC did issue a cease and desist order, requiring Ms. Caracaus to adopt a written nondiscrimination policy and to post it on her rental property. Both parties appealed.

The first issue on appeal is whether Ms. Caracaus has waived her right to jury trial. The record shows there has been no timely demand, thereby constituting waiver.

The applicable statute is Section 519-9(3) of Hawaii Revised Statutes regarding discrimination in real property transactions. Section (3) was enacted in 1992 and expressly disregarded Chapter 368 requirements ("Chapter 368 to the contrary notwithstanding . . .") which include Section 368-12, enacted in 1989. Unlike Section 368-12, the statutory procedure adopted in Section 519-9(3) allows both the complainant and/or respondent to opt out of the HCRC proceedings following a finding of reasonable cause by going to circuit court. If either Respondent Caracaus or Complainant Scotto had so elected, then was the time for either of them to file a demand for jury trial because failure to elect circuit court trial would result (as it did

here) in the HCRC having a contested case hearing and issuing a decision from which appeal de novo to the circuit court pursuant to HRS Section 94-14 (as it is here) would be the only remaining avenue either or both could take.

Thus the Supreme Court decision in SCI Management Corporation v. Sims, 101 Hawaii 438, 71 P.3d 389 (2003), holding that “a respondent who appeals a final order of the HCRC, pursuant to HRS Section 368-16, is entitled to a jury trial on any claims that form the basis for an award of common law damages by the HCRC”, id. at 442, was construing Section 368-12 and arose in connection with allegations of prohibited employment practices involving sexual harassment and retaliation where respondents demanded jury trial following determination of reasonable cause. The Hawaii Supreme Court decision did not allow respondent employers to opt out at that point but rather gave them the right to jury trial as an election to administrative appeal pursuant to Chapter 91 after an HCRC contested case hearing. SCI Management Corporation is not applicable to Section 519-9(3) which does allow respondents to opt out after the determination of reasonable cause. But where there is such an option, the respondent must act timely, otherwise the party “waives his or her right to a jury trial.” Id. at 452 n.12. Likewise, failure to make timely demand of jury trial constitutes election in favor of contested case hearing with later Chapter 91 circuit court review de novo. Id. See State v. Hoshijo ex rel White, 102 Hawaii 307 (Sup. Ct. 2003) (Chapter 91 appeal from HCRC final order is de novo review in the circuit court).

In this case the record is clear and the court finds that HCRC informed Ms. Caracaus of her right to trial consistent with Section 519-9(3) after the determination of reasonable cause, explained the procedure to be followed and responded to Ms. Caracaus’

intelligent question as to how the law works with clear explanation and instruction. (ROA 473-475, 481) The credible record on this issue reads as follows:

Janene Caracaus to HCRC Hearings Officer Livia Wang on 10/12/06 (ROA 474):

Dear Mrs. Wang:

I am confused. Why would I ask for a right to sue letter when I am the defendant and Mr Scotto is the one suing me?

Sincerely,

Janene Caracaus

Response on 10/12/06 (ROA 475):

Dear Ms. Caracaus:

In housing discrimination cases, both the complainant (plaintiff) and the respondent (defendant) have the right to take a case out of the administrative hearing process into a court. This process is set out in Hawaii Revised Statutes (HRS) section 515-9(3) and in Hawaii Administrative Rules (HAR) sections 12-46-20(a) and (b). I sent you copies of these statutes and rules together with the docketing notice on July 18, 2008.

According to this statute and these rules, the process for a respondent is as follows. When the Executive Director finds that there is reasonable cause to believe that discrimination has occurred, it issues a Notice of Finding Reasonable Cause and notifies the respondent that he or she may elect to take the case to a court. (See HAR section 12-46-14(a).) Within 20 days of receiving the Notice of Finding Reasonable Cause, if a respondent wants to take the case to court, he or she must request, in writing, that the Executive Director issue a notice of right to sue. (See HAR section 12-46-10(b)(3). Within 90 days after the Executive Director issues the right to sue to the respondent, the Executive Director will then file an action in court. (See HAR Section 12-46-20(a)(3).) This is how a respondent is able to remove a case out of the administrative hearing process into a court.

However, if a respondent decides to stay in the administrative hearing process, and if I and the Commissioners issue a decision against the respondent, the respondent still has the right to appeal that decision to a court, which is free to reverse the decision. Therefore, if you decide to stay in the administrative hearing process, you will still be able to have a court review the case if there is a ruling against you. (See HRS section 368-16, HAR section 12-46-39.)

Please contact me if you have any other questions.

Very truly yours,

Livia Wang

Hearings Examiner

Thereafter, Ms. Caracaus did not take the requisite action but instead unsuccessfully attempted removal to federal court and dismissal by federal court of the HCRC proceeding. United States District Court Judge Samuel P. King denied both motions by order dated November 6, 2006. On this record, this Court finds and concludes Ms. Caracaus waived her right to jury trial. Thus, this Court proceeds with de novo review pursuant to Chapter 91 and State v. Hoshijo, supra.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Ms. Caracaus owned the house located at 150 Chong Street in Hilo. (ROA 107). In February 2005 Mr. Scotto rented a room (ROA 70) through Caracaus' other tenant, Soma Henderson, who was essentially acting as the property manager (ROA 887-88).
2. Ms. Caracaus was at all pertinent times a nurse and worked as a traveling nurse in Los Angeles from about February to July 2005 and thereafter in Honolulu. (ROA 1037-38; 1062). Ms. Caracaus visited the Hilo house and stayed in one room during those occasional visits between July and November, first meeting Mr. Scotto in person in July 2005. (ROA 1037-39).
3. In March 2005, Mr. Scotto first saw a doctor in connection with symptoms of urinary frequency and discomfort which together with blood test results indicated prostatic cancer. (ROA 1250). In August he was seen at Tripler which in early October confirmed the cancer diagnosis. (ROA 730, 734).
4. Because Ms. Caracaus was a nurse, Mr. Scotto spoke with her about his condition and sought information from her. She recommended his return to California because he would need help and would become weaker. (ROA 1044-45; 1104; 1302, 1364).

5. By October Mr. Scotto was fatigued, experienced pain with walking, had limited activity and some incontinence. He had sold his own store, stopped doing work on the Caracaus property and slept long hours. (ROA 1305-06; 1104; 1207; 1292; 1253).

6. Ms. Caracaus was aware he was weak and could not keep the place clean and that he had sold his store and would need help. (ROA 1104) She knew he was smoking marijuana at the house. She testified that Mr. Scotto said he had a valid medical marijuana license which she asked to see but was not shown. (ROA 1409) He testified that he did have a California license but did not obtain the Hawaii license until November 2005 (ROA 1349-50).

7. Ms. Caracaus testified that she observed Mr. Scotto using alcohol, methadone and morphine (ROA 1068-69) in October 2005 in addition to the marijuana she observed on an August or September visit (ROA 1068-69).

8. During the period of rental by Mr. Scotto, Ms. Caracaus did not reside in the house.

9. By letter dated October 16, 2005, Ms. Caracaus terminated Mr. Scotto's tenancy, announcing she had found another tenant who would move in on December first and giving him until December 1 to move out. The letter read in pertinent part as follows (ROA 724):

Dear Del:

I have done a lot of thinking about your recent tests and considering the fact that you will be needing further treatment, I think it best that you return to California or somewhere where there will be someone to help you through whatever treatment you decide on.

Of course, this is your decision but effective December 1, I will have to rent the apartment to another family. I appreciate all you have done for me and I like you very much, but there is still quite a bit of work needing to be done and I should not expect you to be able to tackle this monumental job.

You must take my word for it that you will get weaker and you will then be in a situation where you cannot do anything. I have seen many cases of cancer in my experience as a nurse.

Steve the contractor and his wife and son will be moving in on the first of December.

10. Ms. Caracaus testified at the 2007 HCRC hearing that her decision to evict Mr. Scotto resulted from her concern that he was using illegal drugs and how that might impact her nursing license. This Court does not find her subsequent explanation credible in light of the contemporaneous letter of eviction focused exclusively on Mr. Scotto's condition and the congruence of testimony by Scotto and Caracaus that her continuous advice was to leave because the cancer would cause his condition to deteriorate. This court therefore rejects Ms. Caracaus' assertion of legitimate motive for eviction of Mr. Scotto.

11. Mr. Scotto did vacate, and as a result of the eviction his belongings were stored but ultimately forfeited and sold to satisfy the arrearage for storage rental.

12. At the HCRC hearing, Mr. Scotto began to estimate the value of specific items he claimed as damages (ROA 1326; specific items at \$750, \$200, \$100). Respondent objected and thereafter Mr. Scotto in response to a question gave his aggregate estimate of \$7,000 (ROA 1330). Mr. Scotto was in a position to know and estimate the value of the forfeited property. See Kwong Lee Yen & Co. v. Manchester Fire Assurance Co., 16 Haw. 685 (1905). The court finds this estimate credible.

13. The eviction was a substantial factor in causing Mr. Scotto's losses of \$7,000.

14. As a nurse, Ms. Caracaus was particularly aware of cancer, its debilitating effects, the need for medication, pain suppressants and the additional hardship a change of living quarters would likely impose upon her tenant at a time when he was seriously ill, weak and in

pain. Upon receiving the termination letter, Mr. Scotto was predictably upset, angry, dismayed and worried about finding a new place. (ROA 971-74, 857,1208-09, 1308, 1320)

15. Ms. Caracaus terminated Mr. Scotto's tenancy because he had cancer and was seriously ill and would become worse. Her action of termination was wilful, wanton and grossly negligent.

16. Mr. Scotto was physically impaired from the prostatic cancer and his life activities were limited as a result of the disease at least by October 1, 20005, because he was limited in his ability to stand, walk, take care of himself and work. Ms. Caracaus knew Mr. Scotto was disabled by that time.

17. Ms. Caracaus violated Section 515-3 of Hawaii Revised Statutes by terminating Mr. Scotto's tenancy on October 16, 2005, because of his disability as defined in Section 515-2.

18. The exemption set forth in Section 515-4(a)(2) does not apply to Ms. Caracaus' termination of Mr. Scotto's tenancy.

19. The HCRC's cease and desist order and other equitable/statutory sanctions are affirmed.

20. Pursuant to Sections 515-13 and 368-17(a), this court awards damages to Loretta Ramos, Executrix of the Estate of Del M. Scotto in the following amounts:

Special damages - \$7,000

General damages - \$10,000

Punitive damages - \$10,000

The court also awards reasonable attorneys fees to Complainant-Appellant Loretta Ramos. A




declaration with back-up documentation as to the claimed amount should be submitted to the court with non-hearing notice of request for attorneys fees so that Ms. Caracaus can timely oppose the amount claimed.

21. Given the award of damages herein this court does not reach the issue whether the HCRC erred by declining to award compensatory damages in connection with its finding of mixed motives.

22. The court having reviewed the files and records herein finds no reversible error based upon HRS Section 91-14(g) as to the HCRC hearing or other procedures and will enter judgment consistent with this de novo review upon determination of the reasonable attorneys' fees to be awarded.

DATED: Honolulu, Hawaii, July 2, 2008

  
Eden Elizabeth Hifo  
Judge of the Above-Entitled Court



CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Findings of Fact and Conclusions of Law was served on the following parties, by depositing the same for mailing in the United States Mail, postage prepaid, on July 2, 2008:

JANENE CARACAUS  
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DATED: HONOLULU, HAWAI'I, July 2, 2008.

*H. Ho*

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CLERK